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of public officers during their terms of office.¹¹ The obiter dictum of *County of Humboldt v. Stern*¹² which was decided under a provision of the county government act of 1897,¹³ similar to section 4290 of the Political Code, was vigorously dissented from by three justices and it seems to be too broad to require recognition under the rule of *stare decisis*.¹⁴ While it is true that to allow a public officer to receive an additional compensation for duties which may properly be attached to his office would be adverse to the policy of the law and likely to engender illegal practices in positions of public trust,¹⁵ yet it is a matter of economy to have the county clerk of a small county occupy a position the duties of which are foreign to his office and which are not so burdensome as to interfere with the proper administration of his former duties. In small counties the clerk is in close association with the board of supervisors and no doubt he can perform the duties of a purchasing agent as efficiently as any person whom the board of supervisors would be compelled to employ at a higher compensation, without any breach of his official duty as county clerk.

H. H. D.

REAL PROPERTY: LANDLORD AND TENANT: THE RULE IN DUMPOR'S CASE—The extent to which courts sometimes blindly follow precedent is perhaps no more forcibly evidenced than by the history of the rule in *Dumpor's Case*.¹ Few cases have been more

¹¹ *Supra*, n. 6.

¹² *Supra*, n. 8.

¹³ Cal. Stats. 1897, § 215, p. 572.

¹⁴ *In re Johnson* (1893) 98 Cal. 531, 542, 33 Pac. 460, 21 L. R. A. 380; *Norris v. Moody* (1890) 84 Cal. 143, 149, 24 Pac. 37. "An obiter dictum is a gratuitous opinion, an individual impertinence, which, whether it be wise or foolish, right or wrong, bindeth none, not even the lips that utter it. Old Judge." *Hart v. Stribling* (1889) 25 Fla. 435, 446, 6 So. 455.

¹⁵ Cf. *Dillon, Municipal Corporations*, § 426.

¹ *Dumpor v. Symms* (1603) 4 Co. Rep. 119b, 76 Eng. Rep. R. 1110. The authorities for the rule given in the case are *Leedes and Compton's Case* (1587) 1 Rolle Abr. 472, *Godbelt* 93, 78 Eng. Rep. R. 57; *Winter's Case* (1572) Dyer 308, 73 Eng. Rep. R. 697; and *Anon.* (1558) Dyer 152, 73, Eng. Rep. R. 331. In a very learned article in 7 *American Law Review*, 616-640, Mr. Joseph Willard shows that these cases do not stand for the propositions cited for in *Dumpor's case*. The rule was not again applied until nearly two hundred years later in the case of *Brummell v. Macpherson* (1807) 14 Ves. Jr. 173, 33 Eng. Rep. R. 487, 488 in which Lord Eldon declared "though *Dumpor's Case* always struck me as extraordinary it is the law of the land at this day." The rule was again followed five years later in the case of *Doe v. Bliss* (1812) 4 Taunt. 735, 128 Eng. Rep. R. 519, 520 at which time Mansfield, C. J., said, "Certainly the profession have always wondered at *Dumpor's Case* but it has been law so many centuries that we cannot now reverse it." In *Macher v. Foundling Hospital* (1813) 1 Ves. & B. 188, 35 Eng. Rep. R. 74, although Lord Eldon thought *Dumpor's Case* was not a very good decision originally he felt that it was none the less settled law. With the same apologies for its unreasonableness several American courts have purported to follow the rule. *Reid v. John F. Wiessner Brewing Co.* (1898) 88 Md. 234, 40 Atl. 877; *Aste v. Putnam's Hotel Co.* (1923) 247 Mass. 147, 141 N. E. 666, 31 A. L. R. 149; *Pennock v. Lyons* (1875) 118 Mass. 92; *Siefke v. Koch* (1866) 31 How. Pr. (N. Y.) 383; *Heeter v. Eckstein* (1874) 50 How. Pr. (N. Y.) 445;

severely attacked,² few errors have so persistently weathered the storm of universal condemnation. The case decided that a condition of forfeiture in a lease that the lessee and his assigns should not assign it without the consent of the lessor was destroyed by a consent to one assignment so that the lease would not be forfeited by an assignment by the assignee without consent. The reason given in support of the rule was that the condition was not apportionable by the act of the parties, that when the license was given the lessee had an interest which was free from any restriction against assignment so that when the assignment was made the assignee got the same interest which the lessee had. The reasoning seems clearly unsound. The license was not to commit a breach of the condition but was a consent to assign without which there would have been a breach had an assignment been made.³ In acquiring the license the lessee complied with the condition. It is difficult to see why such compliance should remove the condition, the license being granted to the lessee and not to his assigns. It is sometimes said that the hostility of the law to restrictions on alienation of land is the real reason for the rule.⁴ If such be the case an extremely technical and unreasonable method has indeed been employed to reach that end. Some justification might be found for the rule in that the license given in *Dumpro's Case* permitted the lessee to assign to any one whomso-

Murray v. Harway (1874) 56 N. Y. 337; *Conger v. Duryee* (1882) 90 N. Y. 594; *Fischer v. Ginzburg* (1920) 191 App. Div. 418, 181 N. Y. Supp. 516; *Easley Coal Co. v. Brush Creek Coal Co.* (1922) 91 W. Va. 291, 112 S. E. 512.

² For example Mr. Joseph Willard in his most excellent article referred to above, sums his argument as follows: "We conceive, therefore, that we have shown that the rule in question was never good law, of recognized authority or in accord with modern decisions; that to overrule it, or, rather, to repudiate its imaginary authority, will not only relieve the law of today of an incubus and bring our system of real property into harmony with common sense; but will, in so doing, involve little or no disturbance to settled titles or vested rights of ownership. And, finally, that the argument of long standing, which is the whole and only ground of acquiescence in its authority by modern judges, ought, in view of these facts, to avail nothing; as an admitted error should receive no greater tolerance, merely because it is venerable." 7 *American Law Review*, 616, 640.

³ The rule has been held to apply only to the case of a license before breach, and that the mere waiver of the breach after it has occurred does not destroy the condition. *Macher v. Foundling Hospital*, supra, n. 1; *Doe v. Bliss* (1812) 4 Taunt. 735, 128 Eng. Rep. R. 519. Obiter: *Doe d. Griffith v. Pritchard* (1883) 5 Barn. & Adol. 765, 2 N. & M. 489, 3 L. J., K. B. 11, 110 Eng. Rep. R. 973; *Seaver v. Coburn* (1852) 64 Mass. 324. In New York however the rule was applied where there was only a waiver and not a license. *Murray v. Harway*, supra, n. 1. *Koehler v. Brady* (1897) 22 App. Div. 624, 47 N. Y. Supp. 984. The rule does not apply to subleases. *Albig v. Morton* (1905) 33 Pa. Co. Ct. 93; *Fidelity Trust Co. v. Kohn* (1904) 27 Pa. Super. Ct. 374; *Miller v. Newton-Humphreyville Co.* (1920) 116 Atl. 325 (N. J. Eq.); *Conger v. Duryee* (1882) 90 N. Y. 594; *Huter v. Eckstein* (1874) 50 How. Pr. 445; *Farr v. Kenyon* (1898) 20 R. I. 376, 39 Atl. 241; *McKildoe v. Darracott* (1856) 13 Gratt. (Va. 827.)

⁴ Restraints on the alienation of an estate for years have generally been recognized as valid. *Nave v. Berry* (1853) 22 Ala. 382; *Kew v. Trainor* (1874) 150 Ill. 150, 37 N. E. 223; *Crowe v. Riley* (1900) 63 Ohio St. 1, 57 N. E. 956. Gray, *Restraints on Alienation* (2d ed.) p. 101.

ever. It might be argued that the assignee should not be presumed likely to assign to a more undesirable person than the lessee who has been given a free hand in the matter. However in *Brummell v. Macpherson*⁵ the rule in *Dumpor's Case* was applied when the license given was to assign the lease to a particular assignee. This case, as well as several which have followed it, is really an illegitimate offspring of *Dumpor's Case* and no justification can be found for it.

While no court has attempted to justify the rule few have had the temerity openly to overrule it.⁶ An Act of Parliament⁷ changed the rule in England but many states in this country still purport to follow it, among them California.⁸ Although the courts of this state have said that the rule in *Dumpor's Case* obtains here, the precise question in *Dumpor's Case* has never been presented to the courts for decision. The first case in this state in which the question arose and the case most frequently cited as the one adopting the rule here is that of *Chipman v. Emeric*.⁹ The lease in that case provided that the lessee should not assign to any person without obtaining the consent of the lessor. The lessee assigned the leasehold to the defendant with the consent of the lessor. It was held that since the first assignment was made with the consent of the lessor such license once given "was sufficient to abrogate the covenant against assignment".¹⁰ As in *Brummell v. Macpherson* the real mischief of the case lies in the fact that the rule is made to operate even when the license was to assign to a particular person and not a general license as in *Dumpor's Case* itself. Furthermore, in the absence of a reservation in the lease, or a grant by statute of a right of entry for breach of the covenants, the rule in *Dumpor's Case* has no proper application to a covenant. If the case stands for the proposition that a covenant against assignment is removed by one consent it is clearly unsupported by *Dumpor's Case*.¹¹ It is important to distinguish a covenant from a condition. A breach of a covenant against assignment without consent, in the absence of contrary statutory provisions, does not give the landlord a right of forfeiture but merely

⁵ *Supra*, n. 1.

⁶ In *Investor's Guaranty Corporation v. Thompson* (1924) 31 Wyo. 264, 225 Pac. 590, the rule is repudiated after a thorough analysis of its history and purported applications.

⁷ 22 & 23 Vict. c. 38, § 6 (1859).

⁸ *Chipman v. Emeric* (1855) 5 Cal. 49, 63 Am. Dec. 80; *German American Sav. Bank v. Gollmer* (1909) 155 Cal. 683, 102 Pac. 932; 24 L. R. A. (N. S.) *Randol v. Tatum* (1893) 98 Cal. 390, 33 Pac. 433; *Rothrock v. Sanborn* (1918) 178 Cal. 693, 194 Pac. 314. See the criticism of *Chipman v. Emeric* and other cases by Mr. Justice Blume in *Investor's Guaranty Corporation v. Thompson*, *supra*, n. 6.

⁹ *Supra*, n. 8.

¹⁰ *Chipman v. Emeric*, 5 Cal. 49, 50.

¹¹ *Paul v. Nurse* (1828) 2 Moody & R. 525, 8 Barn. & C. 486, 7 L. J., K. B. 12, 108 Eng. Rep. R. 1123; *Gannett v. Albree* (1869) 103 Mass. 372. There was no covenant in *Dumpor's Case* but in *Brummell v. Macpherson*, *supra*, n. 1, it was admitted that if the lease in question had contained a covenant the covenant would have remained after the condition had been removed. See 12 *Harvard Law Review*, 272.

gives him a right of action for damages. The covenant against assignment remains after one consent even though the condition be removed. A covenant not to assign without license is one which touches or concerns the land and therefore runs with it binding subsequent assignees.¹² However a clause in the lease providing for re-entry for breach of covenants in effect constitutes a condition.¹³ In California and a number of other states, statutes have been adopted authorizing the landlord to resume possession for the breach of covenants in the lease.¹⁴ The California Code of Civil Procedure grants the landlord a right of forfeiture if the lessee assigns without consent in violation of a covenant requiring consent.¹⁵ It thus appears that a mere covenant against assignment without consent has, by virtue of the California Code, the effect of a condition. Therefore if *Dumpor's Case* is law in this state it would seem, under a covenant forbidding assignment without consent of the lessor, that by once giving a license to assign, the lessor waives thereafter the right to re-entry granted to him by the Code for the breach of that particular covenant.

In *German American Savings Bank v. Gollmer*,¹⁶ there was a stipulation in the lease that the premises were let for banking business purposes and that no other business was to be conducted therein without the lessor's consent in writing. The lease also contained a covenant against assignment without the consent of the lessor with a provision for re-entry in the event of a breach thereof. The court refused to allow the contention that the consent to or waiver by the lessor of a condition in the lease against assignment wiped out the other condition in the lease that no other business was to be conducted therein without the lessor's consent in writing. It is evident that the case does not adopt the rule of *Dumpor's Case*. To be sure the rule was recognized by way of dictum but in reaching the actual decision the court found the rule did not apply to the exact question at hand.¹⁷

¹² *McEachern v. Colton* [1902] A. C. 104, 71 L. J., P. C. (N. S.) 20; *Varley v. Coppard* (1872) L. R. 7 C. P. 505, 26 L. T. 882; *Williams v. Earle* (1868) L. R. 3 Q. B. 739, 37 L. J., Q. B. (N. S.) 231, 19 L. T. (N. S.) 238. In the case of *In re Robert Stephenson* [1915] 1 Ch. 802, 84 L. J., Ch. 563, 113 L. T. 230, 31 T. L. R. 331, the covenant against assignment without consent was held binding even though assigns were not mentioned in the covenant. See 2 Br. Rul. Cas. 806, 809; *Tiffany, Landlord & Tenant*, § 152, p. 936.

¹³ *Winn v. State* (1892) 55 Ark. 360, 18 S. W. 375; *Wheeler v. Earle* (1849) 59 Mass. 31, 51 Am. Dec. 41; *Hurd v. Suravitz* (1892) 148 Penn. St. 202, 23 Atl. 1117.

¹⁴ Cal. Code Civ. Proc. § 1161 (1872); Cal. Civ. Code, § 791 (1872); Arizona Rev. Stats. § 2693; Florida Gen. Stats. §§ 1906, 2226; Illinois, *Hurd's Rev. Stats.* 1905, c. 80, § 9; Indiana, *Burns' Ann. Stats.* 1911, § 7092; Kansas, Gen. Stats. 1905, §§ 4057, 4058; Mass. Rev. Laws 1902, c. 129, § 11; Missouri, Rev. Stats. 1899, § 4108.

¹⁵ Cal. Code Civ. Proc. § 1161 (3).

¹⁶ *Supra*, n. 8.

¹⁷ *Randol v. Tatum*, *supra*, n. 8, is also often cited for the proposition that *Dumpor's Case* is law in this state. In that case the lease contained both a condition that the term might be forfeited if assigned without consent

The latest California case in which the rule was applied was in the Superior Court of Los Angeles in the case of *Kendis v. Cohn*.¹⁸ In that case the lease contained both an express condition and a covenant against assignment without consent and the condition and covenants were made binding on both the lessees and their assigns. A further clause in the lease provided that "Said lessees may with the written consent of said lessors assign said lease to any person or persons of good character and repute and satisfactory to the lessors upon furnishing good and sufficient security to be approved by said lessors." The defendants had given written consent to assign to the plaintiff, the lessee's assignee. The plaintiff was denied damages in a suit against the lessor for an arbitrary refusal of the lessors to examine into the qualifications of the proposed assignee. However it was held that such refusal entitled the lessee to make the assignment without the consent if the person proposed were of good character and repute.¹⁹ The court held by way of dictum that there was no forfeiture because *Dumpor's Case* obtained in this state.

and a covenant not to assign. The lessor gave the tenants written permission to assign to the defendant. The defendant later assigned the lease and his assignee in turn assigned the lease. The last two assignments were made without the consent of the lessor in writing or otherwise. The action in the case was against the defendant as surety upon a bond given by the lessee to secure the payment of rent. It was held that the sureties were discharged by the tender of rent by an assignee of the term. The landlord accepted rent from a third party after knowledge of the two assignments. The court held that this acceptance waived the forfeiture of the lease for breach of a condition to assign the lease without written consent. The court clearly did not follow *Dumpor's Case*. On the contrary it assumes that the condition continues after the first assignment for it declared that the assignments without the consent of the landlord were breaches of the condition and the covenant but that the lessor had the option to forfeit the lease for breach of the condition but that he had not the option of declaring the assignment void, the only remedy for the violation of the covenant being an action for its breach.

In *Rothrock v. Sanborn*, supra, n. 8, there was a stipulation in the consent of the landlord to the first assignment to the effect that "this consent shall not be treated in any way as waiving any of the provisions of said lease nor shall the same be assigned by the said Mrs. Nel. L. Rothrock [lessee's assignee] to any person without our consent first being obtained." This stipulation does not seem to have influenced the court for it based its decision upon the fact that a provision of the lease provided that assignment could only be made with the consent of the lessors and thus seems to have ignored *Dumpor's case* altogether. However the stipulation quoted would have avoided the rule had the court recognized *Dumpor's Case*. In fact that is the best method of avoiding the effect of the rule. It has been held, however, that a provision in the license that the assignee shall hold subject to the performance of the covenants and conditions in the original lease is sufficient to make the condition operative against assigns. *Kew v. Trainor* (1894) 150 Ill. 150, 37 N. E. 223; see also *Hartford Deposit Co. v. Rosenthal* (1915) 192 Ill. App. 211.

¹⁸ San Francisco Recorder, Monday, October 26, 1925.

¹⁹ If the lease simply provides that there is to be no assignment without the lessor's consent it seems the lessor has the right to refuse to consent even though motivated by mere caprice and whim. *Hill v. Rudd* (1890) 99 Ky. 178, 35 S. W. 270; *Girard Trust Co. v. Cosgrove* (1921) 270 Penn. St. 570, 113 Atl. 741; *A. Harris & Co. v. Campbell* (1916) 187 S. W. 365 (Tex. Civ.

Should the question be presented to the courts in the future, the rule in *Dunpor's Case*, especially as illegitimately extended by *Brummell v. Macpherson* to cases where the consent is to assign to a particular person, should not be followed. It was originally without foundation and at the present time is universally condemned as entirely without reason or common sense to support it. If no law should survive the reasons upon which it is founded surely it should not be perpetuated if it is founded upon no reason at all.

R. J. T.

App.) If the lease further provides for consent in case of person satisfactory or acceptable, respectable or responsible, or that consent shall not be unreasonably or arbitrarily withheld, the lessor will not have the right arbitrarily to refuse consent if the proposed assignee is a man of good character and repute. *Willmott v. London Road Car Co.* [1910] 2 Ch. 525, 103 L. T. 447, 20 Ann. Cas. 733; *Underwood Typewriter Co. v. Century Realty Co.* (1909) 220 Mo. 522, 119 S. W. 400, 25 L. R. A. (N. S.) 1173. For a complete review of the cases dealing with the right of the landlord to withhold consent to an assignment or subletting where the lease contains a provision relating to consent see 11 Br. Rul. Cas. 876.

